

✓ 1251
No. 651

RECEIVED

DEC 26 1940

CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1940

ANCHOR STOVE & RANGE COMPANY,
Plaintiff-Petitioner,

v.

MONTGOMERY WARD & COMPANY, INC.,
Defendant-Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

WALTER F. MURRAY,
GEORGE E. WALDO,
Counsel for Petitioner.



INDEX

Subject Index

	PAGE
PETITION FOR WRIT OF CERTIORARI	1
SUMMARY STATEMENT OF THE MATTER INVOLVED	1
REASON RELIED ON FOR THE ALLOWANCE OF THE WRIT ...	5
BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.	7
OPINIONS OF THE COURTS BELOW	7
THE JURISDICTION	7
STATEMENT OF THE CASE AND QUESTION INVOLVED.....	7
ARGUMENT	7
THE BILL OF COMPLAINT PRESENTED A JUSTICIABLE CAUSE WHICH SHOULD HAVE BEEN HEARD BY THE DISTRICT COURT	12

TABLE OF CASES

	PAGE
In Re American Home Furnishers' Corp., 296 Fed. Rep. 605-607	9, 10
In Re Associated Gas & Electric Co., 83 Fed. Rep. (2d) 734-736	9, 11
Auditorium Conditioning Corp. v. St. George Holding Co. (D. C.—E. D. N. Y.), 19 U. S. P. Q. 64, at 72 ..	15
Edison Electric Light Co. v. Mt. Morris Electric Light Co., 57 Fed. 642, at 644 (C. C. N. Y.)	15
Green v. Barney, 19 Fed. 420 (C. C.—D. Mass.)	15
Horn v. Pere Marquette R. Co., 151 Fed. Rep. 626-636 ..	9
Keystone Driller Co. v. General Excavator Co., 290 U. S. 237	15
Metzger v. Vinikow, 17 Fed. (2d) 581 (C. C. A. 9)	14
Smith, Frank F., Hardware Co. v. S. H. Pomeroy Co., 299 Fed. 544-547 (C. C. A. 2)	14
Southern Pacific Co. v. Bogert, 250 U. S. 483-488	14
Stearns-Rogers Mfg. Co. v. Brown, 114 Fed. 939-945 (C. C. A. 8)	14
Swift & Co. v. Jones, 145 Fed. Rep. 489-493	9
Tompkins v. St. Regis Paper Co., 236 Fed. 221-224 (C. C. A. 2)	14
U. S. Fire Escape Company v. Wisconsin Iron & Fire Works, 290 Fed. 171 (C. C. A. 7)	14
U. S. Mitis v. Detroit Steel & Spring Co., 122 Fed. Rep. 863-866 (C. C. A. 6)	14
Wrigley v. Larson, 20 Fed. (2d) 830, 831	14

Supreme Court of the United States

OCTOBER TERM, 1940

ANCHOR STOVE & RANGE COMPANY,
Plaintiff-Petitioner,

v.

MONTGOMERY WARD & COMPANY, INC.,
Defendant-Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

*To the Honorable Chief Justice and Associate Justices of
the Supreme Court of the United States:*

Your petitioner, Anchor Stove & Range Company, plaintiff, respectfully prays for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit to review a judgment of that Court entered on October 14, 1940.

SUMMARY STATEMENT OF THE MATTER INVOLVED

Your petitioner brought two suits for acts of unfair competition, comprising the selling of a counterfeit cabinet heater.

The counterfeit heater was made by a manufacturer for the respondent. The first of the two suits was brought by your petitioner against the manufacturer and resulted after nine years of continuous litigation in a final decree that found the manufacturer guilty of unfair competition, but granted your petitioner only nominal damages. Then this second suit was brought by your petitioner against the respondent. Respondent filed a motion to dismiss the Bill, largely on the ground of laches. This motion was granted and the Bill was dismissed on its merits, without granting your petitioner a hearing. The reason given by the District Court for its action was that petitioner had not filed its brief in opposition to the motion within the ten days fixed by Rule 30A of the District Court. Your petitioner appealed the case, and gave as its reasons for the appeal the following errors:

The District Court erred:

1. In entering the order of November 1, 1939.
2. In dismissing the case.
3. In dismissing the case on the ground of plaintiff's failure to file its reply on time.
4. In holding that the complaint is without merit.
5. In denying plaintiff's motion to vacate the dismissal order, and grant leave to file brief and set for hearing.

The Court of Appeals affirmed the lower court, on the ground that petitioner was guilty of laches in the filing of the suit, but did not pass on the question of whether or not the District Court erred in dismissing the case on the merits, without granting your petitioner a hearing.

The Bill of Complaint in the second suit alleged that the acts of unfair competition were respondent's sales of cabinet heaters which the respondent had caused to be manufactured for it in exact imitation of petitioner's cabinet heaters, by Rymer et al. doing business as the Dixie Foundry Company of Cleveland, Tennessee, defendant in

the first suit. Petitioner's said cabinet heaters were of unique design and bore the name of your petitioner as the manufacturer thereof.

At the request of respondent to the Dixie Foundry Company, the latter's name as manufacturer of the imitative heater was omitted therefrom and the name of the respondent only was placed on these heaters. Petitioner prior to the aforesaid actions of the respondent had created a demand by the public for petitioner's cabinet heaters of the aforesaid unique design, and had given exclusive agencies for the sale of its said cabinet heaters to retailers, that were located in the larger cities of certain designated states.

Respondent sold said imitative heaters through its branch houses which were located in the aforesaid cities in which your petitioner had given the exclusive agencies to retailers for the sale of its cabinet heaters of said unique design. The sales by respondent caused the petitioner's agents to cancel their agency contracts with petitioner and their orders for said cabinet heaters. Respondent's sales of the imitative heaters occurred in the year 1928. Your petitioner first brought the suit against Rymer et al. doing business as the Dixie Foundry Company et al. in the year 1930, in the United States District Court at Chattanooga, Tennessee, for its unfair competition in manufacturing the imitative heaters for the respondent and thereby placing in the hands of the respondent means for deceiving ultimate customers as to the source of manufacture of the imitative heaters. Said United States District Court in the first suit sustained the Bill of Complaint and entered a decree for an injunction and an accounting against the Foundry Company, which appealed from the decree to the United States Circuit Court of Appeals of the Sixth Circuit which affirmed the decree and remanded the case to the District Court for an accounting. The opinion is re-

ported at 70 Fed. Rep. (2d), page 386. The Master proceeded with an accounting and found that your petitioner had suffered damages in the amount of \$18,842.75, by reason of the sales of the imitative heaters to the respondent. The District Court set the Master's award aside upon the ground that your petitioner had not proved that it would have made the sales of the imitative heaters that respondent made, and granted your petitioner only nominal damages. Petitioner took an appeal from this decree to the United States Circuit Court of Appeals, which upon June 29, 1938, affirmed the District Court's decree. The opinion of the Circuit Court of Appeals is reported at page 689 of 97 Fed. Rep. (2d). A petition for rehearing was denied by said Circuit Court of Appeals on the 4th day of October, 1938. A petition for writ of certiorari to this Honorable Court was denied upon the 5th day of December, 1938. The petition for writ was number 464.

The Bill of Complaint of petitioner against respondent was filed in the United States District Court in Chicago, on the 18th day of August, 1939.

Respondent filed the Motion to dismiss the Bill of Complaint on October 16, 1939, and filed a written Brief in support thereof on October 26, 1939. No notice was given by respondent of any setting of the Motion for hearing (Rec., page 15). Rule 30A of the United States District Court in Chicago contains a provision that "The adversary party shall file a reply brief within ten (10) days after the filing of the brief in support of said contested motion" (Rec., page 25). No hearing was had upon the Motion. Upon November 1, 1939, the District Court filed a memorandum in which the Court said that the plaintiff had not filed its brief that was due on October 26, 1939, and had made no application for extension of time, and therefore entered an Order of Dismissal. In so doing, the court said: "However the court, from the argument submitted by defendant, is of

the opinion that the complaint is without merit" (Rec., page 12). Plaintiff on the 27th day of November, 1939, served upon counsel for respondent a copy of a motion to vacate the dismissal order of November 1st, and to grant the petitioner's leave to file its brief and to have a hearing upon the motion (Rec., page 13). Upon the 27th day of November, 1939, the District Court denied the motion to vacate the dismissal order (Rec., page 16). On January 5, 1940, Petitioner appealed from the dismissal order to the United States Circuit Court of Appeals of the Seventh Circuit. The United States Circuit Court of Appeals heard the arguments of petitioner's and of respondent's counsel upon October 4, 1940. Upon October 14, 1940, the Court of Appeals affirmed the District Court. The opinion is reported at page 893 of 114 Fed. (2d). In this opinion, after quoting the memorandum of the District Court, the Court of Appeals says:

"It will thus be observed that the District Court did not rest its decision upon the failure of plaintiff to comply with its rules, but acted upon the complaint upon its merits, albeit without the benefit of presentation by plaintiff. Plaintiff later filed a motion to vacate such order of dismissal, supported by affidavits seeking to excuse its failure to comply with the rules of the District Court, which motion was denied."

REASON RELIED ON FOR THE ALLOWANCE OF THE WRIT

The reason relied on for the allowance of the writ is that the United States Circuit Court of Appeals sanctioned an action by the Lower Court that so far departs from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision. The departure by the Lower Court from the usual course of judicial proceedings was that of sustaining defendant's

motion to dismiss the bill of complaint and of dismissing the bill upon its merits, without notice to plaintiff of the date of hearing of the motion, and without giving plaintiff an opportunity to be heard on the merits of the bill.

Wherefore, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals of the Seventh Circuit, commanding that Court to certify and to send to this Court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket, No. 7212, *Anchor Stove & Range Company, Plaintiff-Appellant v. Montgomery Ward & Company, Inc., Defendant-Appellee*, and that the said decree of the United States Circuit Court of Appeals of the Seventh Circuit may be reversed by this Honorable Court, and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just; and your petitioner will ever pray.

ANCHOR STOVE & RANGE COMPANY,
By WALTER F. MURRAY,
GEORGE E. WALDO,
Counsel for Petitioner.

